Adulteraton of the article was alleged in the libel in that it consisted in part of a decomposed vegetable substance.

On June 16, 1919, no claimant having appeared for the property, judgment of condemnation and forfeiture was entered, and it was ordered by the court that the product be destroyed by the United States marshal.

E. D. BALL, *Acting Secretary of Agriculture.*

**8020. Adulteration of butter. U. S. * * * v. Frank W. Bowar. Plea of guilty. Fine, $100 and costs.** (F. & D. No. 7015. I. S. Nos. 14546-k, 14552-k, 14553-k.)

On March 6, 1916, the United States attorney for the Western District of Wisconsin, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Frank W. Bowar, Gays Mills, Wis., alleging shipment on or about March 23, 1915, and April 13, 1915, from the State of Wisconsin into the State of Illinois, of quantities of butter which was adulterated.

Analyses of samples of the product by the Bureau of Chemistry of this department showed excessive amounts of water and salt.

Adulteration of the article was alleged in the information for the reason that substances, to wit, water and salt, had been mixed and packed with the article so as to lower or reduce and injuriously affect its quality, and had been substituted in part for butter, which the article purported to be.

On November 14, 1919, the defendant company entered a plea of guilty to the information, and the court imposed a fine of $100 and costs.

E. D. BALL, *Acting Secretary of Agriculture.*

**8021. Misbranding of Kar-Ru, Gon-Nol, Kar-Nitum, and Kar-Kol. U. S. * * * v. Kar-Ru Chemical Co., a Corporation. Tried to the court and jury. Verdict of guilty. Fine, $400. Judgment of conviction affirmed in the Circuit Court of Appeals. Motion for rehearing denied.** (F. & D. No. 8315. I. S. Nos. 21329-m, 21330-m, 21336-m, 21337-m.)

On January 19, 1918, the United States attorney for the Western District of Washington, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Kar-Ru Chemical Co., a corporation, Tacoma, Wash., alleging shipment by said company, in violation of the Food and Drugs Act, as amended, on or about January 26, 1917, from the State of Washington into the State of Oregon, of quantities of articles, labeled in part "Kar-Ru" and "Gon-Nol," and on or about October 6, 1916, from the State of Washington into the State of Oregon, of quantities of articles, labeled in part "Kar-Nitum" and "Kar-Kol," all of which were misbranded.

Analysis of a sample of Kar-Ru by the Bureau of Chemistry of this department showed that it consisted substantially of a mixture of sucrose, starch, and charcoal, the proportions and total weights varying somewhat in the several powders. No alkaloids, mercury, arsenic, salicylates, or other potent medicinal substances were present.

Misbranding of this article was alleged in substance in the information for the reason that certain statements appearing upon its label, regarding the therapeutic or curative effects thereof, falsely and fraudulently represented it to be effective as a remedy for rheumatism, for kidney, liver, bladder, stomach, and catarrhal troubles, for mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, when, in truth and in fact, it was not.

Analysis of a sample of Gon-Nol showed that it consisted substantially of a mixture of sucrose, starch, and charcoal, the proportions and total weights varying somewhat. No alkaloids, arsenic, mercury, salicylates, or other potent medicinal substances were present.

Misbranding of this article was alleged in substance for the reason that certain statements regarding the therapeutic or curative effects thereof, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for gonorrhœa, to penetrate the nerve centers to the source of the trouble, to cause a reaction of vital forces, and to stir up latent primary disease due to suppression, and to eradicate from the system the life-destroying gonorrhœal germs and their toxins in both the acute and chronic states, when, in truth and in fact, it was not.

Analysis of a sample of Kar-Nitum showed that it consisted substantially of a mixture of sucrose, starch, and charcoal, the proportions and total weights varying somewhat. No alkaloids or other potent medicinal substances, except a trace of arsenic (4 parts per million of $As_2O_3$), were present.

Misbranding of this article was alleged in substance for the reason that certain statements regarding the therapeutic or curative effects thereof, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for tuberculosis in cattle, for the prevention of tuberculosis in animals, as a relief for tuberculosis in the early stages, to penetrate the nerve centers, to fortify the system against disease germs and their toxins, and to eradicate tuberculosis from the system, when, in truth and in fact, it was not.

Analysis of a sample of Kar-Kol showed that it consisted substantially of a mixture of sucrose, starch, and charcoal. No alkaloids, mercury, or other potent medicinal substances, except a trace of arsenic (11 parts per million of $As_2O_3$), were present.

Misbranding of this article was alleged in substance for the reason that certain statements regarding the therapeutic or curative effects thereof, appearing on the label of the article, falsely and fraudulently represented it to be effective as a remedy for cholera in hogs, as a preventive of cholera in hogs, as a relief of cholera in hogs, to fortify the system against disease germs and their toxins, to reach the source of and to eradicate the cholera germ, as a preventive of cholera and other diseases, as a remedy for cholera and diarrhœa in man, and as a relief for cholera and diarrhœa in man, when, in truth and in fact, it was not.

On July 23, 1918, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel at the conclusion of the trial on July 26, the following charge was delivered to the jury by the court (Cushman, *D. J.*):

Gentlemen of the jury, you have had the issues in this case explained to you for several days. I do not deem that it is necessary to outline at any great length the indictment in the case. You will have it with you in the jury room, and it has also been explained to you. These four kinds of medicine here—each kind is made the subject of a different count in the indictment. There are four counts in the indictment, and the defendant company is charged with having moved in interstate commerce, between this State and Oregon, packages of these different remedies named in the different counts in the indictment. It is charged that the labels on these parcels contained representations regarding the curative and therapeutic effect of the substances contained in the packages which were false and fraudulent.

The defendant has entered a plea of not guilty to the information, which places the burden of establishing the truth of every material allegation of at least one count in the indictment upon the prosecution, the burden requiring that they should establish the truth of every material allegation by evidence

sufficient to convince you beyond a reasonable doubt before you could return a verdict of guilty. If you have reasonable doubt, taking each count by itself, as though it were a separate indictment, if you have a reasonable doubt concerning any material allegation in each count of this indictment, it would be your duty to return a verdict of not guilty. If you have no reasonable doubt concerning any material allegation in any count of the indictment, it would be your duty to return a verdict of guilty as to that count.

You will understand that these labels that were described in the indictment and that appear upon the exhibits contain representations that the contents would cure a number of diseases, and, of course, it would not be necessary to prove that the entire label, that all of the representations on the label regarding the curative and therapeutic effect of the contents were false and fraudulent; it would be necessary before you could return a verdict of guilty upon any count to find beyond a reasonable doubt that at least there was one representation upon the label regarding the therapeutic and curative effect of the contents that was false and fraudulent.

The defendant, as I understand it, both at the time the admissions were made and from the argument of its counsel, admits a number of matters set out in the indictment; admits that these packages were sent in interstate commerce with the labels upon them as charged; but the gist of the defense, as I understand it, is that the defendant denies either that there was any statement regarding the therapeutic or curative effect of any of these medicines on these labels that was false, and denies that, if any such representations were false, they were fraudulently made; and it seems from the argument and the whole trend of the case that your attention will be narrowed to those two propositions.

It is not required of the court to charge you as to what is false. It is about as simple as the English language can make it; but it is charged not only that these representations were false but that they were fraudulent. Now, a fraudulent representation may be defined about as follows—that is, one man represents to another that something is true to be a fraud, that representation must be false and the party who makes it must know that it is false; he must make it with the intention that the other party will act upon it, relying upon it as being true, and parts with his money; he must have been injured or defrauded of his money to that extent. That is what is meant by charging that the representations regarding these medicines were fraudulent. To apply it to one of the representations, as I understand it mentioned in the information and contained in one of these labels, the statement that this Gon-Nol would eradicate the germ of gonorrhœa from the human system; that statement, before you could convict upon that alone, would have to have been false—that is, that the medicine would not have had that effect. The defendant company must have made the statement knowing that it was false, or, at any rate, having no ground to believe that it was true, having made it so recklessly and wantonly, with no honest belief that it was true. The representation must have been made in such a way and with the intention that people would purchase the medicine believing it would eradicate from the human system the germ of gonorrhœa, and that, acting upon that belief, if any person purchased it acting upon that belief, that person would be swindled out of his money. That would have to be all established so as to convince you beyond a reasonable doubt before you could find that that particular representation was fraudulent.

There is no presumption arises against the defendant by reason of the fact that it has been indicted or placed on trial before you. Every presumption of law favors the innocence of the defendant, and this presumption of innocence continues throughout the trial until such time as the prosecution has produced evidence sufficient to break down the presumption and overcome it and convince you of the truth of every material allegation in at least one count in the indictment by evidence beyond a reasonable doubt.

Reasonable doubt, as used in the foregoing instruction and as used in the other instructions which I will read to you, means just what the words mean; that is, a doubt that is based upon reason, a doubt for which you can give a reason. It does not mean every possible doubt, because it is almost impossible to establish a particular truth, and especially the truth of the assertions that rest in opinion regarding men's ailments and what cures them to an exact certainty and beyond all possibility of a mistake, but it does mean more than mere probability or mere preponderance of evidence.

Reasonable doubt has sometimes been defined as such a doubt as a man of ordinary prudence, intelligence, and determination would allow to cause him to pause or hesitate in one of the more important transactions connected with

his own affairs. If you have such a doubt on a material matter that was disputed in any count of the information, it would be your duty to give the defendant the benefit of that doubt and acquit him; if you have no such doubt, it would be equally your duty to convict.

I will read you certain instructions which I have been requested to give:

"This case is a prosecution for violation of that part of the Pure Food and Drug Act known as the Sherley Amendment. The information sets out four counts, each alleging a distinct and separate offense by appropriate allegations. You will take this information with you to your jury room and may refer to it for specific knowledge of the material allegations therein. The defendant, however, has not required the Government to produce proof of the formal allegations, but has admitted them to be true, but has pleaded not guilty to each and every of the four counts of the information, and this plea raises the issue as to every material allegation in these counts contained, except as the formal allegations are admitted. By these admissions the issues are narrowed substantially to two questions. The first is: Do the several preparations put upon the market in interstate commerce by the defendant in fact contain curative agents for the several ailments set forth upon the labels of these respective preparations? If you find from the evidence that each and every of these preparations do in fact contain such curative agents, your verdict will be not guilty under each and every count of the information. If you find as a fact that one or more of these preparations does not in fact contain such curative agents, then, as to such preparations, it will be necessary to consider the second question in the case, which is: Did the defendant in fact believe that the preparation in question would be effective in alleviating the ailments for which its label says it is intended to be used?

"It is not proper in such a case as this to try rival well-established schools of medicine, and, if you find that the defendant has only used in its several preparations homeopathic remedies for the alleviation of ailments, then your verdict should be not guilty, and you will not be called upon to consider any other question in the case.

"If you find, however, as a fact that some or all of the preparations put upon the market by the defendant do not, in fact, contain remedial agents used in any school of medicine for the relief of the ailments for which it is put upon the market, then you will be called upon to consider the second question in the case, and that is, did the defendant honestly believe that such remedy would have a curative effect upon the ailments for which it is offered to the public? The law requires that the Government must prove beyond a reasonable doubt, not only that the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. To be considered fraudulent within the meaning of the law, requires that the defendant should either know that the remedy which he offers to the public is of no curative value or that he represents to be of curative value recklessly and without caring whether it would cure or whether it did not, for the purpose of defrauding his customers and getting their money for an article which he knew in fact, or ought to have known, was of no value. If you find from the evidence that the defendant honestly believed and had reasonable ground to believe that his remedy was of curative value, then your verdict must be not guilty, no matter if in fact the remedies were worthless from a medical point of view."

The other instructions are in a series of four, and the law is stated in a series of four, the first applying to the first count and the same principle of law and the second one applying also to the second count, so they will have a great deal of sameness, but there being four counts in the indictment, I am going to read the law applying to the principle in each count, in series:

"Gentlemen of the jury: You will recall that the government alleges that the following statement in count I as to Kar-Ru was false and fraudulent: 'Kar-Ru, The Constitutional Remedy for Rheumatism—it is effective in Kidney, Liver, Bladder, Stomach, and Catarrhal Troubles, Mental and Physical Debility, Neuritis, Eczema, Blood Diseases, Irregular Menstruation, and the most Acute and Chronic Rheumatic Afflictions.' It is unnecessary for the Government to prove that all of these statements were false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial properties of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count I. If the defendant honestly believed it would have the effect stated, it is not guilty.

"The Government alleges that the statement in count II, that Gan-Nol is a remedy for gonorrhœa, and that this remedy eradicates from the system the life-destroying gonorrhœal germs and their toxins, in both the acute and chronic states, was false and fraudulent.

"You are instructed that it is unnecessary for the Government to prove that both of these statements were false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial effects of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count II. If defendant honestly believed it would have the effect stated, it is not guilty.

"The Government alleges that the statements in count III on the label as to Kar-Nitum, in the following language, 'Kar-Nitum, Tubercular Remedy for Cattle. Kar-Nitum is a scientifically prepared remedy for the prevention of Tuberculosis in animals and the relief of the disease in the early stages. It penetrates the nerve centers and fortifies the system against disease germs and their toxins—Give until the disease germ is eradicated from the system,' were false and fraudulent.

"You are instructed that it is unnecessary for the Government to prove that all of these statements are false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial effects of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count III. If defendant honestly believed it would have the effect stated, it is not guilty.

"The Government alleges that the statements in count IV on the label as to Kar-Kol, in the following language, 'Kar-Kol, A Remedy for Hog Cholera, Kar-Kol is a scientifically prepared deep-acting remedy for the prevention of cholera in hogs, and the relief of the disease, in the early stages. It penetrates the nerve centers, and causes a reaction of the vital force, produces a proper digestion and assimilation of natural elements and food substances, fortifies the system against disease germs and their toxins. By its broad and deep action, it reaches the source of trouble and eradicates the cholera germ. It acts as a preventive of cholera and other diseases, * * * Good for Humans—For cholera, or diarrhœa in humans, take one-half teaspoonful once a day, dry in mouth, and repeat daily until relieved,' were false and fraudulent.

"You are instructed that it is unnecessary for the Government to prove that all these statements were false and fraudulent. If you believe beyond a reasonable doubt that any one statement as to the curative or remedial effects of this medicine was false in fact, and that the defendant knew that it was false, you may find the defendant guilty under count IV. If defendant honestly believed it would have the effect stated, it is not guilty."

Here is another series of four:

"As to count I, if you believe beyond a reasonable doubt that Kar-Ru is not the constitutional remedy for rheumatism, and is not effective in kidney, liver, bladder, stomach, and catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, and that the defendant must have known this, you may find the defendant guilty under count I. If defendant honestly believed that it would have the effect stated, it is not guilty.

"As to count II, if you believe beyond a reasonable doubt that Gon-Nol is not a remedy for gonorrhea, and does not eradicate from the system the life-destroying gonorrhœal germs and their toxins in both their acute and chronic states, and that the defendant must have known this, you may find the defendant guilty under count II. If defendant honestly believed it would have the effect stated, it is not guilty.

"As to count III, if you believe beyond a reasonable doubt that Kar-Nitum is not a scientifically prepared remedy for the prevention of tuberculosis in animals and the relief of the disease in the early stages, and does not penetrate the nerve centers, and fortify the system against disease germs and their toxins, and does not eradicate disease germs from the system, and that the defendant must have known this, you may find the defendant guilty under count III. If defendant honestly believed it would have the effect and was as stated, it is not guilty.

"As to count IV, you are instructed that if you find that Kar-Kol is not a remedy for hog cholera, and if you further find that Kar-Kol is not a scientifically prepared, deep-acting remedy for the prevention of cholera in hogs, and the relief of the disease in the early stages, and if you find that it does not

penetrate the nerve centers and cause a reaction of the vital force, and does not produce a proper digestion and assimilation of natural elements and food substances, and does not fortify the system against disease germs and their toxins, and by its broad and deep action it does not reach the source of the trouble, and does not eradicate cholera germs, and does not act as a preventive of cholera; and if you further find that Kar-Kol is not good for humans for cholera and diarrhœa, and that the defendant must have known this, you may find the defendant guilty under count IV. If defendant honestly believed it would have the effect and was as stated, it is not guilty.

"You are instructed that if you find beyond a reasonable doubt that Kar-Ru is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count I. If it honestly believed it was in all things as stated, it is not guilty.

"You are instructed that if you find beyond a reasonable doubt that Gon-Nol is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count II. If it honestly believed it was in all things as stated, it is not guilty.

"You are instructed that if you find beyond a reasonable doubt that Kar-Nitum is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count III. If it honestly believed it was in all things as stated, it is not guilty.

"You are instructed that if you find beyond a reasonable doubt that Kar-Kol is worthless for any one of the things for which it is labeled, and that the defendant knew this, you may find the defendant guilty under count IV. If it honestly believed it was in all things as stated, it is not guilty.

"If you find beyond a reasonable doubt that the statement that Kar-Ru is the constitutional remedy for rheumatism, and that it is effective in kidney, liver, bladder, stomach, and catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions was absolutely false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty under count I. If it honestly believed it was in all things as stated, it is not guilty.

"If you believe beyond a reasonable doubt that the statement that Gon-Nol is a remedy for gonorrhœa, and that it eradicates from the system the life-destroying gonorrhœal germs and their toxins in both the acute and chronic states, was absolutely false, and was made by the defendant with a reckless and wanton disregard as to whether it was false or true, you may find the defendant guilty under count I. If it honestly believed it was in all things as stated, it is not guilty.

"If you believe beyond reasonable doubt that the statement that Kar-Nitum is a tubercular remedy for cattle and that Kar-Nitum is a scientifically prepared remedy for the prevention of tuberculosis in animals, and the relief of the disease in the early stages, and that it penetrates the nerve centers, and fortifies the system against disease germs and their toxins, was false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty under count III. If it honestly believed it was in all things as stated, it is not guilty.

"If you believe beyond a reasonable doubt that the statement that Kar-Kol is a remedy for hog cholera, and that by its broad and deep action it reaches the source of trouble and eradicates the cholera germs, and acts as a preventive of cholera and other diseases, and that it is good for humans for cholera and diarrhœa, was false, and was made by the defendant with a reckless and wanton disregard as to whether it was true or false, you may find the defendant guilty under count IV. If it honestly believed it was in all things as stated, it is not guilty."

You will understand that the instructions that I have given you are to be taken as a whole. These written instructions omitted some of the requirements that I stated to you in my oral instructions which were necessary to constitute fraud. You will understand that the written instructions are amended by the oral instructions, and that these requirements are necessary in addition to what I read to you.

You are in this case, as in every other case where questions of fact are submitted to you for determination, the sole and exclusive judges of every question of fact in the case, the weight of the evidence, and the credibility of the witnesses. In weighing the evidence and determining the amount of credit

that should be given the different witnesses who have come before you and testified, it is your duty to take into account their appearance, the appearance of each witness, and the manner, demeanor, and conduct of the witness in giving his or her testimony, whether the witness earnestly appeared to be telling you the exact truth, carefully avoiding saying anything that apparently the witness did not believe, and avoiding exaggeration, or whether the witness may not have appeared to you as reluctant, evasive, hesitating, trying to keep from telling you what the witness claimed to know, whether a witness may not have struck you as being too willing, too free, running along and injecting information that the witness claimed to have into the case about which no one had asked; also you will take into consideration the testimony of each witness by itself, whether it appears to be likely, probable, reasonable under all of the circumstances, whether it is corroborated by other evidence where you would expect it to be corroborated, if it were true, or whether it is contradicted by other evidence in the case. You will also take into account the situation in which each witness was placed in relation to the things about which he or she testified, as one witness might be much better situated to know the exact facts than another who was equally anxious to tell you the truth. You will also take into account the interest that any witness may be shown to have in the case, either as shown by the manner in which the witness gave his or her testimony or by the relation of the witness to the case. Mr. Hebb, having taken the stand in behalf of the defendant company, of which he is the sole stockholder, you should apply to his testimony the same tests as you do to the testimony of other witnesses, including his natural interest in the case.

The jury thereupon retired, and after due deliberation returned into court with a verdict of guilty on all counts. Thereafter the defendant company, by counsel, filed a motion in arrest of judgment, which was denied by the court on October 29, 1918. On December 30, 1918, the trial court entered judgment that the defendant corporation should pay a fine of $100 on each of the four counts of the information, making an aggregate fine of $400.

On June 21, 1919, the defendant company filed its petition for a writ of error and its assignments of error, and on July 31, 1919, the transcript of the record was filed in the Circuit Court of Appeals for the Ninth Circuit, and on September 16, 1919, argument was had upon the writ of error before the Circuit Court of Appeals. On May 3, 1920, the matter having come on for final disposition, the judgment of conviction by the lower court was affirmed, as will more fully appear from the following decision by the Circuit Court of Appeals (Gilbert, Morrow, and Hunt, *Circuit Judges*, and Morrow, *Circuit Judge*, delivering the opinion of the court):

The Food and Drug Act of June 30, 1906 (34 Stat., 768), provided in section 2 as follows:

> "That the introduction into any State * * * from any other State * * * of any article of food or drugs which is * * * misbranded" within the meaning of the act, is prohibited; and that "any person who shall ship or deliver for shipment from any State * * * to any other State * * * any such article * * * so misbranded" *within the meaning* of the act, "shall be guilty of a misdemeanor."

Section 8 of the act provided:

> That the term "misbranded" as used herein, shall apply to all drugs, or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein that shall be false or misleading in any particular.

In U. S. *v.* Johnson, 221 U. S. 488, this act came before the Supreme Court of the United States upon the question as to the meaning of the word "misbranded" as defined in the act with respect to a false statement on the label. The court held "that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article possibly including its strength, quality and purity," and not at statements as to curative effect. In

that case it was charged that the label stated or implied that its contents were effective in curing cancer, the defendant well knowing that the representations were false, the court held that even if the statement was misleading it was (not ?) covered by the statute. This decision was rendered in May, 1911.

President Taft almost immediately transmitted to Congress a special message calling attention to the necessity of passing at an early date an amendment to the Food and Drugs Act supplementing the existing law to "prevent the shipment in interstate and foreign commerce of worthless nostrums labeled with misstatements of fact as to their physiological action." In the course of the message the President said:

> In my opinion, the sale of dangerously adulterated drugs, or the sale of drugs under knowingly false claims as to their effect in disease, constitutes such an evil and warrants me in calling the matter to the attention of the Congress. Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers, but are a distinct menace to the public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatements of fact as to worthless mixtures on which the sick will rely while their diseases progress unchecked. (62d Cong., 1st sess. Vol. 47, Cong. Rec., Pt. 3, p. 2379.)

In response to this message an amendment to the act was introduced in the house which was explained by Mr. Sherley, its author. In the course of his remarks he referred to the President's message and the decision of the Supreme Court in the Johnson case, in which he stated that the court had held:

> That the sections of the pure food law relating to misbranding did not embrace statements as to the curative or therapeutic properties of drugs. There was a very strong dissent handed down by Justice Hughes and concurred in by Justice Day and Justice Harlan, holding that a proper construction of the act would embrace such cases. The majority of the Court seem to have gone on the idea that it was not the intention of Congress to enter into the domain of matters in issue between rival schools of medicine, but, as is very clearly set out by the minority in their dissenting opinion, there were great many cases that did not belong in this twilight zone, but represented plain cases of fraud and deceit. In the opinion of the minority of the court, it was the intention of the law to reach such cases, and believing it certainly ought to be the intention of the law to reach them, I introduced the bill now before the House. Just after its introduction, the President called attention to the importance of the decision and the need of a remedy by a special message to Congress. This act has been drawn with some care, and as perfected by the amendments offered will certainly reach these cases of fraud without undertaking to have the Government enter into the disputed domain that lies outside of proper legislation. (62d Cong., 2d sess. Vol. 48, Cong. Rec., Pt. 11, p. 11,322.)

The amendment was passed. It provided among other things the addition of a paragraph to section 8 of the act of June 30, 1906, defining misbranding, as follows:

> Third. If its package or label shall bear or contain any statement, design or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent.

The information in this case contains four counts. The first count charges the defendant with the unlawful shipment and delivery for shipment via United States mail from the city of Tacoma, State of Washington, to the city of Portland, State of Oregon, consigned to Clarke Woodward Drug Co., a certain package containing three boxes, each box containing an article designed and intended to be used in the cure, prevention, and mitigation of diseases of men. The character and brand of the boxes is set forth, and it is charged:

> That when shipped and delivered for shipment as aforesaid said article of drugs was then and there misbranded within the meaning of the said act of Congress, as amended, in that the following statements regarding the therapeutic or curative effect thereof appearing on the label aforesaid, to wit, "'Kar-Ru,' the constitutional remedy for Rheumatism * * * It is

effective in Kidney, Liver, Bladder, Stomach, and Catarrhal Troubles, Mental and Physical Debility, Neuritis, Eczema, Blood Diseases, Irregular menstruation, and the most Acute and Chronic Rheumatic Afflictions," was false and fraudulent in this, that the same was applied to said article unlawfully and in reckless and wanton disregard of its truth or falsity so as to represent falsely and fraudulently to the purchasers thereof and create in the minds of the purchasers thereof the impression and belief that the article was in whole or in part composed of or contained ingredients or medical agents effective among other things as a remedy for rheumatism * * * or effective as a remedy for kidney, liver, bladder, stomach, or catarrhal troubles, or effective as a remedy for mental or physical debility, neuritis, eczema, blood diseases, irregular menstruation, or the most acute and chronic rheumatic afflictions, when in truth and in fact said article was not in whole or in part composed of and did not contain any ingredients or medical agents effective, among other things, as a remedy for rheumatism, or effective as a remedy for kidney, liver, bladder, stomach, or catarrhal troubles or effective as a remedy for mental or physical debility, neuritis, eczema, blood diseases, irregular menstruation, or the most acute or chronic rheumatic afflictions.

The other three counts were identical with the first count, except as to the name of the article shipped, namely, Gon-Nol for diseases of men, Kar-Nitum for diseases of cattle, and Kar-Kol for diseases of man and hogs. Upon the trial of the case before a jury, the corporate capacity, identity, and domicile of the defendant and the shipment of the articles described in the information were admitted. And evidence was introduced in support of the information and for the defendant. The jury found the defendant guilty upon all four counts. The defendant contends that there was no substantial evidence to sustain the charges in the information that the packages in question were misbranded within the meaning of the act of Congress as amended. The claim of the defendant is that this is a controversy relating to the efficacy of homeopathic remedies, and that the theory of the prosecution arises upon the testimony of its medical witnesses that homeopathic remedies were worthless. Assuming that the exceptions reserved by the defendant at the trial were sufficient to raise whatever questions there may be in this contention, the question is, What were the questions of fact submitted to the jury?

The prosecution introduced the testimony of E. O. Eaton, a chemist in the employ of the Government at the San Francisco laboratory, who testified that he had analyzed samples of Kar-Ru which showed sugar 83.4 per cent; starch, 12.6 per cent; charcoal, 1.63 per cent. He did not find any other active medical ingredient, except one part to a million of arsenic in some of the samples. There was a certain amount of water and a small amount of ash or inorganic salts. When samples were burned, ash was left. Some samples showed ash 0.15 of 1 per cent, and all of them mixed together one part arsenic to a million. Alkaloids, chloroform, and ammonium salts were absent, as well as heavy metals, except a trace of iron.

He analyzed samples of Gon-Nol in which he found sugar, 61.75 per cent; starch, 30.1 per cent; ash, 0.65 per cent, consisting of calcium, sodium phosphate, potassium, iron salts, ammonium salts, arsenic one part in a million, charcoal 12 per cent, heavy metals, trace of iron.

He analyzed samples of Kar-Nitum and found sugar, 76.7 per cent; starch, 15.9 per cent; charcoal, 2.85 per cent; ash, .55 per cent; arsenic, 5 parts to a million.

He analyzed Kar-Kol and found sugar, 81.9 per cent; starch, 13.8 per cent; charcoal, 2.15 per cent; ash, 3 per cent; arsenic, 6 parts to a million.

On cross-examination this witness testified that he first made a qualitive analysis to find the different ingredients and then a quantitive analysis to find the amount of each. He was asked whether in his tests he could have caught small quantities of certain elements such as ammonium salts, ferric chlorid, and iodin. He thought he could have detected any small amount, but could not say whether he would have detected a quarter of a grain of ammonium salts. He knew he could have detected a half grain. With respect to ferric chlorid and iodin he could have caught one-tenth of a grain, but could not say if he would have detected minute parts or indeterminable quantities. He made a test for nitric acid. He would have detected probably a drop in a gallon. He found one part in a million of arsenic.

The prosecution called Calvin S. White, a major in the Medical Reserve Corps of the United States Army, educated in the University of Pennsylvania

and Oregon. Analysis of the elements in Kar-Ru was submitted to the witness, and he testified that it would be worthless in the cure of any disease. "It is all inert, and there is nothing there which could possibly be a curative agent in any disease. It is not possible to get any one medicine which will cure all of the different diseases enumerated." The analysis of the elements of Gon-Nol was submitted to the witness, and he testified that "it would have no effect at all. It would do neither harm nor good." On cross-examination the witness testified that he had informed himself of the practice of the homeopathic school of medicine. "There is no school which teaches the use of those things for rheumatism," (referring to pulsatilla and lycopodium). The homeopaths did not recognize arsenic as a remedy for chronic rheumatism.

J. B. McNerthney, a witness for the prosecution, testified that he had been practicing medicine for 16 or 17 years. That he had a medical education in the University of Minnesota and New York and a postgraduate at Berlin and Vienna. The synoptical analysis of the formula of Kar-Ru was submitted to him. He testified that "it would have no medical value, * * * Absolutely no school of medicine would recognize it as a remedy."

The synoptical analysis of Gon-Nol was submitted to him. He said it appeared to contain no medical qualities and was absolutely worthless as a cure for gonorrhœa. In his opinion, it would not be recognized in any school of medicine.

From an examination of the synoptical analysis of the formula of Kar-Kol, he testified that it appeared to contain no drugs of medical value and was absolutely worthless in the treatment of cholera or diarrhœa in human beings. It would not be considered a remedy in any recognized school of medicine. That the medcine contains six parts in a million of arsenic would not give it any medical value. The addition of lycopodium, pulsatilla, sulphur, nitric acid, and thuja in such small quantities as not to be discovered by the chemist would be worthless in the cure of any disease.

Chester H. Woolsey, for the prosecution, testified that he had studied medicine at the University of California, took a postgraduate course at Cornell, did some work at Columbia, and was then an instructor at Stanford University. "From what the analysis of Gon-Nol shows, it would not have the least effect and would be absolutely worthless in any form of gonorrhœa. It would do more harm than good, because the patient would be wasting time with the useless remedy, while the disease would be getting a firmer hold on him." "The formula which the analysis disclosed would not be recognized by any school of medicine that I know of as a remedy for gonorrhœa." "From the examination of the synoptical formula of the analysis of Kar-Ru, I would say that Kar-Ru is absolutely worthless as a remedy for rheumatism, kidney, liver, stomach, and catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions."

H. K. Faber, a graduate of medicine from the University of Michigan and associate professor of medicine at Stanford University, at that time in the base hospital at Camp Lewis; P. B. Swearingen, a graduate of the St. Louis University, had taken a special postgraduate course in New York and Chicago and had been a practicing physician for 26 years; and Royal M. Gove, who had beer practicing medicine in Tacoma for 28 years, were called as witnesses for the prosecution and all testified to substantially the same effect as the preceding witnesses.

H. J. Shore, holding a veterinary degree and employed as a bacteriologist by the United States Department of Agriculture; N. A. Madsen, a graduate of Iowa State College and Veterinarian College of Copenhagen, employed by the United States Department of Agriculture as meat inspector; and Samuel B. Foster, a graduate of the Washington State College for Veterinary Medicine and employed by the United States Government in the tuberculosis eradication work in Washington and Oregon, testified for the prosecution that from the analysis of Kar-Nitum the preparation would not be a remedy for tuberculosis or relief of the disease at any stage.

At this point the prosecution rested its case. The defendant did not move for an instructed verdict in its favor, but proceeded to introduce evidence for its defense.

P. H. Hebb was called and testified that he was the president, manager, and practically the only stockholder of the defendant corporation; that he was not a medical man by profession, but for seven or eight years had been reading and studying medicine, particularly homeopathic medicine; that they put upon

the market some medicines for common ailments, both for man and beasts; that he wrote the labels for Kar-Ru, Gon-Nol, Kar-Nitum, and Kar-Kol, and in so doing he used common and accepted terms rather than medical terms; that they all contained medical curative agents; all are made on a base of triturated sugar, carbo-vegetalis, commonly known as charcoal. This base merely carries the medical agents and is similar in purpose to the half glass of water in which medicine is often administered. The witness was asked on cross-examination how much tuberculinum is there in Kar-Nitum? His counsel objected to this question on the ground that the witness could not be compelled to disclose to the public his trade secrets. It was sufficient, he contended, to meet the charge in the information, to show that the remedies contained curative agents, even one curative agent, in quantity sufficient to act medicinally as recognized and practiced by any school of medical practitioners. The objection was overruled, and the witness answered: "In the sixth potency." How much that was he could not say; it was less than one in a thousand; the witness was asked as to the potencies of arsenic and pulsatilla in Kar-Ru. He replied that he used the sixth potency of arsenic; from the seventh up of pulsatilla; thuja, the eighth; nitric acid, the ninth; lycopodium, tenth; sulphur, eleventh. In Gon-Nol he used the following potencies: Medorrhinum, sixth; sulphur, seventh; arsenicum, eighth; thuja, ninth; lycopodium, tenth; nitric acid, eleventh.

A. H. Grimmer for the defense testified that he resided in Chicago, was in general practice as a physician; had been adjunct professor in the Hahnemann Homeopathic Medical College of Chicago for 10 years, and for 12 years had conducted classes in postgraduate work, members of which came from all over the world—many from Europe, particularly from the London Homeopathic Hospital. That homeopathy is an organized system of medicine which maintains colleges and hospitals, has its county and State medical associations, is recognized in every State in the Union, and in Michigan, Iowa, and California has homeopathic departments in the State universities, maintained at State expense. Potencies are in general use in the homeopathic practice. The degree varies with the individual practitioner. That homeopathy, as other schools of medicine, seeks to diagnose a case before prescribing. He testified as to the potencies of the remedies used for the diseases mentioned on the labels attached to the packages in controversy. That the remedies would contain curative agents for such ailments. The witness was the father-in-law of Mr. Hebb, the president, manager, and practically the only stockholder of the defendant corporation.

Upon this evidence it was clearly a question of fact for the jury to determine whether the preparations offered to the public by the defendant and described in the information were in fact misbranded in the statements regarding their therapeutic or curative effect and whether such statements were false and fraudulent. The defendant having defended on the ground that the preparations were remedies in accordance with the theory and practice of homeopathy, that question also became a question of fact for the jury, to be determined under proper instruction from the court. Upon this issue the court instructed the jury as follows:

> Do the several preparations put upon the market in interstate commerce by the defendant in fact contain curative agents for the several ailments set forth upon the labels of these respective preparations? If you find from the evidence that each and every of these preparations do in fact contain such curative agents, your verdict will be not guilty under each and every count of the information. If you find as a fact that one or more of these preparations does not in fact contain such curative agents, then, as to such preparations, it will be necessary to consider the second question in the case which is: Did the defendant in fact believe that the preparation in question would be effective in alleviating the ailments for which its label says it is intended to be used?
>
> It is not proper in such a case as this to try rival well-established schools of medicine, and if you find that the defendant has only used in its several preparations homeopathic remedies for the alleviation of ailments then your verdict should be not guilty, and you will not be called upon to consider any other question in the case.
>
> If you find, however, as a fact that some or all of the preparations put upon the market by the defendant do not in fact contain remedial agents used in any school of medicine for the relief of the ailments for which it

is put upon the market, then you will be called upon to consider the second question in the case, and that is: Did the defendant honestly believe that such remedy would have a curative effect upon the ailments for which it is offered to the public? The law requires that the Government must prove beyond a reasonable doubt, not only that the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. To be considered fraudulent within the meaning of the law requires that the defendant should either know that the remedy which he offers to the public is of no curative value or that he represents to be of curative value recklessly and without caring whether it would cure or whether it did not, for the purpose of defrauding his customers and getting their money for an article which he knew in fact, or ought to have known, was of no value. If you find from the evidence that the defendant honestly believed and had reasonable ground to believe that his remedy was of curative value, then your verdict must be not guilty, no matter if in fact the remedies were worthless from a medical point of view.

These instructions were in accordance with the law as declared by the Supreme Court in Seven Cases of Eckman's Alteratives *v.* United States (239 U. S., 510–517–518), where the court excluded the field where there might be differences of opinion between schools and practitioners and explained the words "false" and "fraudulent" to conform to such exclusions.

The court said:

It can not be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the lawmaking power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

It is objected that the court allowed Dr. White, a witness for the prosecution, to testify that the preparations which had been analyzed by the chemist, Eaton, and shown to the witness were absolutely worthless and had no food, curative, or medical value. The testimony was clearly admissible. In the case just cited, the court held that the law does reach one who puts inert matter or a worthless composition in the channels of trade labeled as a cure for disease when he knows it is not.

The remaining errors assigned relate to the action of the board in overruling objections to questions put to witnesses as to the curative value of arsenic in a portion of one part to a thousand; as to whether there was any known medicine that would cure kidney, bladder, liver, stomach, catarrhal troubles, mental and physical debility, neuritis, eczema, blood diseases, irregular menstruation, and the most acute and chronic rheumatic afflictions, gonorrhœa, cholera, and diarrhœa in human beings. The objection was overruled and the witness answered, "Why, no," and then said, "I might modify that by"—— The court said. "You have answered the question. Is there anything further?" The objection was the use of the word "cure." In support of the objection it was said, "There is no representation by the defendant that the medicines will 'cure' any of these diseases or that he has any one medicine which is a remedial agent for all of them." On the cross-examination of the witness, which immediately followed his answer, he said:

Medicines might be combined so that the combinations would have a beneficial effect upon persons suffering from one or more of the diseases enumerated. For instance, if a man were suffering from kidney disease or Bright's disease the physician would have to make a diagnosis of Bright's disease and then select the drug, and then he would have to have some dosage. Then, if a man had stone in the bladder, or some bladder trouble, you would have to make a diagnosis first and select a drug and have a proper dosage, a dosage strong enough to dissolve or neutralize whatever acid there was in the kidney or bladder; but first you would have to diagnose it. Then you would use a medicine just the same as you would use a knife, to remove it, and it must be in a sufficiently powerful dose to work. That is my method of practicing medicine, and there are no other methods which are any good, that I know of.

In view of the fact that no exception was taken to the answer of the witness, his proposed modification, and modification on cross-examination, we do not see that the defendant was prejudiced by the question.

With respect to the remaining objections as to whether the remedies contain any alkaloids, mercury, salicylates, arsenic, or other medicines of a similar nature; as to the effect of giving Kar-Nitum to certain cattle; as to the food value of the sugar, starch, etc., found in Kar-Ru and Kar-Kol; as to the classification of various diseases; the cost of homeopathic remedies; the exclusion of a letter written by some one in New Jersey addressed to Mr. Hebb concerning the administration of Kar-Kol to hogs; and as to the potency of certain of the remedies in some of the articles mentioned, we find no substantial error on the part of the court in its ruling upon these questions. The testimony was admitted under well-known rules of evidence or was without prejudice to the defendant.

The judgment of the court below is affirmed.

Thereafter the defendant company, by counsel, filed its petition for a rehearing before said Circuit Court of Appeals, and on July 6, 1920, said petition was denied by the court.

E. D. BALL, *Acting Secretary of Agriculture.*

**8022. Adulteration and misbranding of Green Mountain Syrup. U. S. * * * v. Scudder Syrup Co., a Corporation. Plea of guilty. Discharged upon payment of costs.** (F. & D. No. 9111. I. S. No. 8734-p.)

On December 31, 1919, the United States attorney for the Northern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Scudder Syrup Co., a corporation, Chicago, Ill., alleging shipment by said defendant, in violation of the Food and Drugs Act, as amended, on or about October 12, 1917, from the State of Illinois into the State of Alabama, of a quantity of an article, labeled in part "Green Mountain Syrup Scudder Syrup Co. Chicago," which was adulterated and misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it was composed principally of corn sirup and cane sirup.

Adulteration of the article was alleged in substance in the information for the reason that a mixture composed of corn sirup and cane sirup had been substituted in whole or in part for Green Mountain sirup, to wit, maple sirup, which the article purported to be.

Misbranding of the article was alleged in substance in the information for the reason that the statement, to wit, "Green Mountain Syrup," borne on the containers containing the cans which contained the article, regarding it and the ingredients and substances contained therein, was false and misleading in that it represented that the article was Green Mountain sirup, to wit, maple sirup, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that the article was Green Mountain sirup, to wit, maple sirup, whereas, in truth and in fact, it was not Green Mountain sirup, to wit, maple sirup, but was a mixture composed of corn sirup and cane sirup. Misbranding was alleged for the further reason that it was food in package form, and the quantity of the contents was not plainly and conspicuously marked on the outside of the package.

On June 22, 1920, a plea of guilty to the information was entered on behalf of the defendant company, and the court ordered its discharge on the payment of the costs of the proceedings.

E. D. BALL, *Acting Secretary of Agriculture.*